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IN THE

Supreme Court of the United States

AHMED BELBACHA, PETITIONER

V.

GEORGE W. BUSH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether granting certiorari before judgment is appropriate where the Court of Appeals has already concluded that it lacks jurisdiction to consider the case.

2. Whether the Court should resolve a conflict among the lower courts concerning the proper standard for granting a temporary restraining order.

3. Whether the decision of an earlier panel of a Circuit Court that it lacks jurisdiction to consider a matter bars a later panel of that court from granting preliminary relief to preserve the *status quo* pending this Court's resolution of the jurisdictional issue decided by the earlier panel.

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OPINIONS BELOW

The judgment of the District Court, which is unreported, is attached as Appendix A to this Petition. The denial of a stay by the Circuit Court of Appeal for District of Columbia, which is also unreported, is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the district court was entered on July 27, 2007. The order of the D.C. Circuit was entered on August 2, 2007. Petitioner invokes the Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition involves statutes or constitutional provisions only incidentally.

STATEMENT

1. Ahmed Belbacha was brought to Guantánamo in February 2002. He is not and has never been a terrorist, although he has never had the chance to prove this in a fair forum. Respondents concede Petitioner does "not pose a continuing threat to the United States." Opp. to Emergency Mot., Ex. 7 (Benkert Decl. ¶ 5); *see also id.*, Ex. 6 (Williamson Decl. ¶¶ 2-3) (same). After over five years of intolerable treatment by the U.S. military, respondents now propose to send Belbacha to Algeria, where he faces almost certain torture. Belbacha objects to this transfer, preferring even Guantánamo to what awaits him there.

Belbacha first applied to the district court for a temporary restraining order preventing his transfer to Algeria. District Judge Collyer appeared to believe that Belbacha's asylum claim was meritorious, but she denied his motion for a TRO because she believed her hands were tied by

Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007). In *Boumediene*, the D.C. Circuit held that the Military Commissions Act of 2006 ("MCA"), left the courts without jurisdiction to hear and consider actions by Guantánamo detainees, except as provided in the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, tit. X, 119 Stat, 2739. Jude Collyer stated that, with *Boumediene* pending in this Court, the D.C. Circuit's decision did not necessarily require her to dismiss Belbacha's habeas action; but the judge believed that, notwithstanding the pendency of *Boumediene* in this Court, the D.C. Circuit's decision precluded her from granting Belbacha preliminary relief. (Pet. App. A.)

The day after the district court denied his TRO motion, Belbacha applied to the D.C. Circuit for an emergency stay of his transfer pending his appeal from the district court's denial of his TRO motion. The D.C. Circuit denied his stay application because it considered itself bound by its decision in *Boumediene*. The D.C. Circuit treated as irrelevant to the stay analysis that this Court's grant of certiorari signals that Belbacha has at least some chance of success on the merits for purposes of the first prong of the standard for granting preliminary relief. Instead, the D.C. Circuit docketed Belbacha's case for appellate review on an "expedited" schedule. (Pet. App. B.) Belbacha, however, may be long gone before his appeal is heard. In any event, it would appear to be futile for Belbacha to

press his appeal in the D.C. Circuit, because that court has already decided it lacks jurisdiction over his case. For that reason, and because the issues presented in this petition are worthy of the Court's review, this petition for certiorari before judgment should be granted.[1]

2. Petitioner, Ahmed Belbacha, is a citizen of Algeria and a former resident of the United Kingdom. After finishing mandatory national service in Algerian army, Belbacha worked as an accountant at Sonatrach, the government-owned oil company. While working there, Belbacha was recalled for a second term of service. The Groupe Islamique Armée (GIA) – then at the height of its violent campaign for an Islamic Algeria – found out about the recall notice.[2] The GIA threatened to kill Belbacha if he rejoined the army and ordered him to quit his job with

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[1] The day after the D.C. Circuit denied his stay application, Belbacha filed a petition for injunction, No. 07-07A98. Yesterday Belbacha filed an original habeas petition. Those motions are pending. *Cf. Felker* v. *Turpin*, 518 U.S. 1051 (1996).

[2] The GIA has carried out attacks in Algeria against civilians and regime officials and employees for years. *See* "Group Profile: Armed Islamic Group," http://www.tkb.org/Group.jsp?groupID=27. The GIA later spawned a splinter group now called "Al Qaeda in the Islamic Maghreb." This group continues to carry out violent attacks in Algeria. *See* Craig Whitlock, "Al Qaeda Branch Claims Algerian Blasts," Wash. Post, Apr. 12, 2007.

Sonatrach. The GIA was notorious for killing soldiers and had also murdered a number of Sonatrach employees.[3]

Belbacha never reported for his recall, making him a deserter in the eyes of the Algerian government. He tried to hide from the GIA inside Algeria, but the group pursued him, going at least twice to his home and threatening him and his family. Deciding that he had to leave Algeria, Belbacha obtained a French visa and fled. After a few days in France, Belbacha went to England. There, he went to Bournemouth, where he had childhood friends. In July 2000, he applied for asylum in England. Belbacha chose England because it has a reputation for respecting human rights, and France had a significant GIA presence.

Belbacha's well-founded fear of persecution has only intensified since the U.S. brought him to Guantánamo. In the eyes of extremist groups like "Al Qaeda in the Islamic Maghreb," Belbacha is still an ex-soldier and a Sonatrach employee. Should he be rendered to Algeria, the group will likely target him again. At the same time, Belbacha will *also* return to Algeria having been branded by the U.S. as an "enemy combatant" with asserted links to Al Qaeda. These assertions are baseless. But, given that the

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[3] *See Issue Paper: Algeria*, Immigration and Refugee Board of Canada (detailing threats and attacks against Sonatrach employees beginning in 1996), http://www.irb-cisr.gc.ca/en/ research/publications/index_e.htm?docid=115 &cid=0&sec=CH05.

Algerian government considers Belbacha a deserter, it is likely, if not certain, that the Algerian authorities will imprison and torture him.

Caught between domestic terror groups and a government that brutalizes suspected Islamists, Belbacha cannot safely return to Algeria. His fear is such that he would prefer to endure the oppressive environment of Guantánamo until an asylum state can be found. It is worth pausing to consider exactly what that means: At Guantánamo, Belbacha is held in near-total isolation. Every surface in his cramped cell is made of steel. No window lets sunshine in; he suffers the glare of neon lights 24/7. His only diversion is two hours for "rec" alone in a pen with a deflated football. His family may not visit him, he may not call them, their mail takes months to reach him. When it does, it is often heavily censored. This is the world Belbacha chooses over rendition to Algeria.

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS APPROPRIATE FOR CERTIORARI BEFORE JUDGMENT.

Certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. That standard is satisfied here. The questions presented here go to the ability of the lower courts to emergency relief, surely an issue of imperative public importance. Deviation from normal appellate practice is warranted precisely because the D.C. Circuit has decided that it lacks jurisdiction to provide emergency relief in this case. Finally, the issues presented require immediate determination in this Court because Belbacha may be sent to Algeria as early as this week, consigning him to likely torture and other abuse and extinguishing this Court's ability to decide those issues in time to pro-

vide relief. Meanwhile, his case presents issues of great importance concerning the proper application of a TRO in the lower courts, issues that only arise under emergency circumstances such as are presented here.

The need for emergency relief *and* certiorari before judgment in this case finds precedent in *Ex Parte Quirin*, 317 U.S. 1 (1942). The German saboteurs in *Quirin*, facing military commission trial and the possibility of execution upon conviction, filed petitions for habeas corpus. This Court not only heard the case prior to review by any lower court but convened a special session to do so. Likewise, the Court acknowledged the importance of the jurisdiction issues presented in the Guantánamo litigation when it granting review in *Boumediene* v. *Bush*, 127 S. Ct. 3076 (2007), after having denied review – a reversal apparently last enacted sixty years ago. Belbacha's very life may hinge on this Court's decision in that case. Yet the Court of Appeals believed that it had disabled itself from delaying Belbacha's transfer to Algeria long enough to do Belbacha any good.

Barefoot v. *Estelle*, 463 U.S. 880 (1983), is instructive. In *Barefoot*, the district court denied a motion for a stay of execution very similar to the TRO sought here and judged under a similar four-factor test. As here, the court of appeals refused to stay the case but docketed it for appellate review. Just as Barefoot would have been executed before his appeal was decided, Belbacha will be back in the torture chambers of Algeria before the Court of Appeals decides this case. This Court treated the motion for a stay as a petition for certiorari before judgment to guide the lower courts on the proper standard for granting a stay of execution. *See also Wilson* v. *Girard*, 354 U.S. 524 (1957) (certiorari before judgment granted to review injunction against extradition of U.S. soldier for trial in Japan); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368 (1949) (certiorari before judgment

granted to assess the jurisdiction of the lower tribunal and the legitimacy of the lower court's injunction).

This Court has also granted certiorari before judgment where a case ran parallel to a closely related case where certiorari has been granted. Thus, the Court granted certiorari before judgment in *United States* v. *Fanfan*, 543 U.S. 220 (2005), because certiorari was also granted in a companion case, *United States v. Booker*. *See also Oliphant* v. *Suquamish Indian Tribe*, 431 U.S. 964 (1977) (certiorari before judgment granted as to a petitioner where certiorari was granted with respect to another petitioner); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 12 n.1 (1963). As in those cases, Petitioner's case runs parallel to *Boumediene*, in that both courts below relied upon it to dismiss his requests to stay his transfer. In short, certiorari before judgment is tailor-made for situations such as this.

II. CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT AMONG THE LOWER COURTS WITH RESPECT TO TRO STANDARDS.

This is a conflict that not only afflicts the Guantánamo litigation – where as many as fifty prisoners who may be released over the coming months face probable persecution in their home countries – but also afflicts litigation throughout the country in important ways.

The Court has provided lower courts with little guidance concerning the proper standards for analyzing TRO motions. The fact that TROs are inherently evanescent may explain why the Court has had little opportunity to guide the lower courts. Nor may district courts find guidance in the Federal Rules of Civil Procedure. Fed. R. Civ. P. Rule 65 addresses formal requirements but does not address the most basic question of how a district court should decide whether and when to issue such an injunction. For lack of guidance from this Court or the

federal rules, the lower courts have fashioned wildly inconsistent standards.

Most courts apply some variation of the following four-part standard: "(1) whether the plaintiff will probably succeed on the merits; (2) whether irreparable harm to the plaintiff would result if the injunction is not granted; (3) the balance of harms between the plaintiff and defendant if the injunction is allowed; and (4) whether the injunction will have an impact on the public interest." Judge Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 497-98 (2003). But the elements of this standard and their application vary significantly from one circuit to the next, conjuring an image of not one but many Chancellors, with twice as many feet.

This Court's meager jurisprudence in this area explains the divergence among the lower courts. This Court's first foray in this area came in *Russell* v. *Farley*, 105 U.S. 433 (1881), and *dicta* from the case still provides the general framework for three of the four prongs of the test. In the course of upholding the federal courts' use of an injunction to order a security bond, *Russell* referred to the "settled rule of the Court of Chancery, in acting on applications for injunctions," that preliminary relief depends on a comparison of the balance of the harms to the two parties. *Id.* at 438. Under this rule, the court is "to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused." *Id.*

Russell is also the genesis of the third prong, involving the moving party's chance of success on the merits: "If the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party." *Id.* at 438. The final factor - the public interest - was injected into the framework by a passing reference in *Inland Steel Co.* v.

United States, 306 U.S. 153, 157 (1939) (stating that it is "the duty of a court of equity granting injunctive relief to do so upon the conditions that will protect all including the public – whose interests the injunction may effect."). Indeed, some lower courts derived the idea of a "sliding scale" from other *dicta* in *Russell*: If the moving party's "legal right is doubtful," then the court should be more "reluctant" to enter the preliminary injunction. 105 U.S. at 438.

In the 1970s and 1980s, the Court decided a series of cases concerning standards for injunctions. These cases, however, did not clarify the developing jurisprudence in the lower courts. On the contrary, these cases only sowed further confusion.

In *Brown* v. *Chote*, 411 U.S. 452 (1973), the Court seemed to suggest that there were only *two* factors that a district court should consider in determining whether to issue a preliminary injunction: (1) the plaintiff's "possibilities of success on the merits," and (2) "the possibility that irreparable injury would have resulted, absent interlocutory relief." *Id.* at 456. A year later in *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423 (1974), the Court indicated a shift away from the balancing test and spoke of a two-factor test in which the moving party "would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits." *Id.* at 441. Thirteen years later, in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), the Court returned to the notion of "balancing" the factors, stating that the lower court "must balance competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 542. Little

surprise, then, that the lower courts cannot agree on the interplay between the factors.

In *Granny Goose*, the Court abandoned its earlier reference to a "possibility" of irreparable injury or success on the merits, and used the term "likelihood" instead. 415 U.S. at 441. This new terminology spawned new confusion and magnified the differing standards currently applied in the lower courts. In *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, (1975), the Court observed that the "traditional standard for granting a preliminary injunction requires the plaintiff to show that he will suffer irreparable injury and also that he is likely to prevail on the merits." *Id.* at 931. In addition, the Court cautioned that a district court must "weigh carefully the interests of both sides" and apply a "stringent" standard in deciding whether a plaintiff is entitled to a preliminary injunction. *Id.* These terms also spring up, somewhat at random, in lower court enunciations of the rule.

Given that the Court has left the lower courts with murky and shifting guidelines, it is not surprising that the circuits have struggled to apply Rule 65 consistently. The only decision from this Court in the past twenty years directly on the subject of a preliminary injunction came in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In that case, the Court concluded that the equitable powers of federal courts to issue preliminary injunctions under Rule 65 are limited by the Judiciary Act of 1789. *Id.* at 318. The Court canvassed the role of injunctions prior to the founding of this nation, *id.*, but did not address the current disarray among the lower courts.

Expressing the frustrations of many, Magistrate Judge Denlow has issued a plea for a uniform federal standard:

> Unfortunately, the problem facing parties and judges is that "confusion persists" regarding which standard should apply for granting or denying the

> preliminary injunction motion. Because the standard is interpreted differently by the various courts of appeals, there is no uniformity in application.

Denlow, *Time for a Uniform Federal Standard*, 22 Rev. Litig. at 497 (footnote omitted).

As applied in this instance, the law of the D.C. Circuit falls at one extreme of the lower courts' confusion. The proper standard for a TRO requires an appropriate application of a four-part test. As framed by the D.C. Circuit, the court must consider whether: (1) the movant would suffer irreparable injury if the injunction were not granted; (2) granting an injunction would further the public interest; (3) the movant has a substantial likelihood of success on the merits; and (4) granting the injunction would not injure other parties. *See Al-Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001). Other circuit courts, however, state the four factors in diverse ways, and interpret them with equal inconsistency. For example, the Fourth Circuit states the four prongs as: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood the plaintiff will succeed on the merits; and (4) the public interest." *BidZirk, LLC v. Smith*, 2007 WL 664302 at *2 (4th Cir. 2007). Unlike the D.C. Circuit's rule, this does not provide for consideration of the impact on parties other than the two litigants.

The lower courts in this case illogically ruled that Belbacha must show a likelihood of success on the merits *under the law of the circuit* even though the validity of the law of the Circuit has been case in grave doubt by this Court's grant of certiorari in *Boumediene*.

Thus, this case poses the important question of what it means to have a chance of success on the merits. Belbacha has (1) an asylum application pending in the responsible government agencies; (2) an action for a writ

of habeas corpus pending in district court; (3) an appeal pending in the D.C. Circuit; and, (4) a petition for injunction and an original petition for habeas corpus pending in this Court. Belbacha makes several "claims" with respect to these applications. He seeks notice of any intention of respondents to return him to Algeria, so that his asylum claim can be given the thoughtful attention it merits and requires.[4] He seeks an injunction against his return to Algeria from the district court. He seeks asylum through the regular legal channels, and will challenge any adverse administrative ruling. He seeks collateral relief in conjunction with his writ of habeas corpus – disclosure of allegations against him, and so forth. He seeks a writ of habeas corpus declaring that his detention is illegal (a claim reinforced by the Department of Defense decision to clear him for release). The parties in this case disagree, however, as to what Belbacha must show to demonstrate that he is likely to be successful in attaining.

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[4] Professor Chesney has noted that, "by the end of June 2005, judges had decided thirty-four . . . GTMO transfer motions, 35 with twenty-seven pro-detainee decisions imposing the requested notice requirement and six pro-government decisions denying that relief (one split decision granted relief to one petitioner but denied it to two others)." Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 (2005).

Respondents argued below that,[5] to merit preliminary relief, Belbacha had to show that he had a likelihood of prevailing on success – not only on the merits of his claim for relief, but on the question whether the courts had jurisdiction to consider the merits of his claim for relief. Of course, the D.C. Circuit had decided the jurisdictional issue against Belbacha's position in *Boumediene*. Thus, Belbacha would be unable to litigate the merits of his claim even though this Court's grant of certiorari in *Boumediene* cast the D.C. Circuit's decision in doubt.

Belbacha asserts a more nuanced position. He argues that he meets the other three prongs of the test and that a TRO therefore should issue because, as a result of this Court's grant of review in *Boumediene*, he has a likelihood of success on his claim that *some* federal tribunal should hear the merits of his asylum application, or at least his demand that he not be rendered back to Algeria. Since there are no cases from this Court on this issue, the lower courts must analogize to similar contexts. This Court's precedents are inconclusive. When assessing a motion for a stay of execution pending certiorari, this Court considers not whether the petitioner will ultimately prevail in challenging his death sentence, but whether he

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[5] Petitioner continues to be hampered by the lack of a transcript of his TRO hearing in the district court and must await that transcript before he may quote respondents verbatim.

will persuade four justices that the Court should hear his case.[6]

Indeed, the issue on which certiorari may be granted does not have to be a substantive question that might result in the petitioner's death sentence being vacated; it could be an intermediate procedural issue that is a condition precedent to hearing the merits of the case at all. *See, e.g., Lonchar* v. *Thomas*, 517 U.S. 314 (1996) (granting a stay and certiorari to determine whether the lower courts were bound to reach the merits of the case).

The lower courts are all over the map in their interpretation of the law, and this Court should intervene and straighten out this confusion. For example, though qualified by its use of a sliding scale – itself a device not universally employed by other courts of appeals – the D.C. Circuit uses the most rigorous standard of all the lower courts on this prong of the TRO test: The petitioner must show "a *substantial* likelihood of success on the merits of the case . . . ." *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (emphasis supplied). Although the "likelihood" of success standard derives from

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[6] Precedent indicates that granting the rehearing petition in *Boumediene* required the vote of *five* Justices. *See Fisher v. Alabama*, 504 U.S. 936 (1992) (denying rehearing without requesting a response, noting that four Justices would have requested a response), strengthening Belbacha's claim of likelihood of success on the merits.

this Court's precedent, *see Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. at 441, it is unclear from whence the term "substantial" derives. This standard has also been adopted by the Tenth and Eleventh Circuits. *See SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991); *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004). The Ninth Circuit, by contrast, requires "a strong likelihood of success on the merits." *Johnson* v. *California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (internal quotation marks omitted). The Fifth Circuit requires a "likelihood of success on the merits." *Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1067 (5th Cir. 1986), and the Eighth Circuit test looks to a "probability of success on the merits," *Dataphase Systems, Inc.* v. *CL Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). That court previously flirted with the rule adopted by Ninth Circuits but, noting the conflict among the circuits, rejected *en banc* what it characterized as the "alternative test." *Id.* at 112 n.3. *See also Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (per curiam) (en banc) (referring to the Eighth Circuit's analysis as the "alternative test").[7]

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[7] The Arkansas Supreme Court specifically rejected the Eighth Circuit's analysis in *Dataphase*. *See Custom Microsystems, Inc.* v. *Blake*, 344 Ark. 536, 541 (Ark. 2001).

Similar, but not identical, to the Eighth Circuit analysis, the Third Circuit requires "a reasonable probability of success on the merits". *Crissman* v. *Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir. 2001).

In short, there is total disarray in the lower courts on what the party requesting injunctive relief must show. There can be little doubt that Petitioner has "sufficiently serious questions going to the merits to make them a fair ground for litigation" such that he may prevail at some time in the future – that very litigation is going ahead in this Court right now, in *Boumediene*. On the other hand, using its own formula, the D.C. Circuit has ruled that he should lose, because its decision in *Boumediene* absolutely prevents him from make the showing required under D.C. Circuit law as it currently stands.

Unfortunately, the disputes in the lower courts identified above are not the only issues that divide the lower courts when it comes to the proper assessment of the four TRO factors. Circuits require different tests depending on the nature of the TRO's prayer. For example, courts differentiate between *prohibitory* injunctions (maintaining *status quo*) and *mandatory* injunctions (requiring some affirmative action by the non-movants). *See Louis Vuitton Malletier* v. *Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006). In this scheme, the mandatory injunctions require the movant to meet a higher standard – "a 'clear' or 'substantial' likelihood of success where the injunction sought is mandatory - i.e., it will alter, rather than maintain, the status quo." *Sunward Elecs., Inc.* v. *McDonald*, 362 F.3d 17, 24 (2d Cir. 2004) (citation omitted). The Tenth Circuit has elaborated on the Second in this respect. *See SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991):

> The heightened burden applies to preliminary injunctions that (1) disturb the status quo, (2) are

mandatory as opposed to prohibitory, or (3) provide the movant substantially all the relief he may recover after a full trial on the merits"; "in order to prevail on a motion for preliminary injunction where the requested injunction falls into one or more of these three categories, the movant must show that on balance, the four factors weigh heavily and compellingly in his favor."

Belbacha's case illustrates how opaque such a rule is. What is the relevant "status quo"? Is it a legal question – the relative power of the relevant parties? Or is it a factual inquiry – the physical status of Petitioner and Respondent?[8] Belbacha submits that it is factual – he is currently in Guantánamo Bay and does not wish to leave there for Algeria. Respondents would argue that the status quo involves the legal relationship between the parties – the government has the power to move him and currently plans to do so within the next couple of weeks,

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[8] The Tenth Circuit has defined the status quo as factual. *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991) (emphasis in original) ("The status quo is not defined by the parties existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights."

and that the status quo will be disturbed by the judiciary altering this balance.

The circuits also differ in terms of how the four factors interact between each other. In the D.C. Circuit, for example, the rule is that they should be balanced on a sliding scale: a party can compensate for a lesser showing on one factor by making a very strong showing on another factor. *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667 (D.C. Cir. 2005) (citation omitted). An injunction may be justified, for example, with a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.

In practice, however, the D.C. Circuit has been inconsistent in its application of its own rule. Judge Urbina has noted that "the D.C. Circuit seems to have set forth two lines of precedent that do not entirely overlap." *Adair* v. *England*, 217 F. Supp. 2d 1, 3 n.7 (D.D.C. 2002). He pointed out that in one line of cases, *see, e.g., Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1995), the court indicated that "a litigant must show" all four factors to win injunctive relief. Yet in other cases, such as *Davenport* v. *Int'l Bhd. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999), the court of appeals does not require that a litigant demonstrate all four factors.

The dispute, apparently unresolved in the D.C. Circuit, has also divided the other circuits. The Fifth Circuit believes that the party seeking such relief must satisfy a cumulative burden of proving each of the four elements, and that relief "should only be granted if the movant has clearly carried the burden of persuasion on *all four* . . . prerequisites." *Miss. Power & Light Co.* v. *United Gas Pipeline*, 760 F.2d 618, 621 (5th Cir. 1985) (emphasis added). That is, if a party fails to meet *any* of the four requirements, the court cannot grant the temporary restraining order or preliminary injunction. *Villas at Parkside Ptnrs v. City of Farmers Branch*, 2007 WL

1836844, at 12 (N.D. Tx. 2007). The Eleventh Circuit sides with the Fifth in this regard. *Siegel* v. *LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (per curiam) (en banc) ("In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to *each* of the four prerequisites.") (quotations omitted and typography altered) (emphasis added).

In the Third Circuit, on the other hand, the movant need only make a showing on *two* of the four elements:

> the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court 'should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.'

Constructors Asso. of Western Pennsylvania v. *Kreps*, 573 F.2d 811, 815 (3d Cir. 1978) (citations omitted). The Third Circuit goes on to adopt an analysis whereby these factors merely "structure" the analysis, leaving nebulous the manner in which the analysis should be conducted.

Meanwhile, rather than balancing the factors, the Ninth Circuit applies a "continuum" test. *Southwest Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam) (en banc) ("This analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor."). The Fourth Circuit applies a "harm first" analysis, and places much

more weight on the presence of potential harm to the litigants than on the other factors. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1992) ("The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors."). The Fourth Circuit subsequently moves to the other factors but, illustrating the general confusion, cannot make up its mind whether the movant should show a "strong" or a "substantial" likelihood of success: *Microstrategy Inc.* v. *Motorola, Inc.*, 245 F.3d 335, 340 (4th Cir. 2001) ("When, as here, the balance of hardship 'does not tilt decidedly in plaintiff's favor' then a plaintiff must demonstrate a 'strong showing of likelihood of success' or a 'substantial likelihood of success' by 'clear and convincing evidence' in order to obtain relief."). Indeed, the court thinks that different standards should apply depending on the subject matter, and that trademark cases, for example, mandate a greater burden of proof. *Id.*

When assessing "harm", the Sixth Circuit takes the position that if an injunction is sought against actions that are probably unconstitutional, only the likelihood of success is relevant. *Deja Vu of Nashville, Inc.* v. *Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 400 (6th Cir. 2001) ("if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment."). While this view has not been accepted by other

courts,[9] it would clearly be dispositive of Belbacha's application in this case: By granting review in *Boumediene*, this Court has already found a substantial likelihood that the Military Commissions Act of 2006 is unconstitutional, so under the Sixth Circuit rule no other inquiry would be relevant.

In short, the circuits are all over the place. Judge Posner has engaged in a semi-mathematical analysis of the factors, where a TRO should be granted to a petitioner who is likely to lose his case, but stands to lose far more than the respondent who has the better legal case:

> Curtis argues that since the balance of harms inclined in its favor, the judge should not have denied the injunction merely because he did not think the company had a good case in law. What is true is that if the party seeking the preliminary injunction would suffer more harm from the denial of it than his opponent would suffer from its being granted, the injunction should be granted even if

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[9] *Cf. Southwest Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam) (en banc) ("We are met with legal authority on both sides of the contest. There is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election. The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.").

> the party seeking it has no more than a 50-50 chance of winning, and even, in some cases, if the odds are worse. If for example the party seeking the injunction would lose $ 10,000 if it was denied, and has a 40 percent chance of being in the right, and the other party would lose only $ 1,000 if the injunction is granted and has (necessarily) a 60 percent chance of being in the right, then the cost of denial of the injunction to the party seeking it, when discounted by the probability that he is in the right, would exceed the cost of granting the injunction to the other party, when discounted by the probability of *his* being in the right. (That is, $ 4,000 ($ 10,000 x .40) more than $ 600 ($ 1,000 x .60).)

Curtis 1000 Inc. v. *Suess*, 24 F.3d 941, 945 (7th Cir. 1994) (citations omitted). Belbacha's case, Judge Posner's analysis would almost inevitably lead to a TRO, since respondents stand to lose nothing of any concrete nature, while Belbacha may lose his life.

III. CERTIORARI IS WARRANTED TO CLARIFY WHETHER THE D.C. CIRCUIT'S DECISION IN *BOUMEDIENE* BARRED IT FROM PRESERVING THE STATUS QUO

Finally, this case also presents one other systemically important issue: the standard by which lower courts should act to preserve their ultimate jurisdiction during a period that existence of jurisdiction is unresolved. It is clear as a general matter that a lower court must assess its own jurisdiction, and has the power to maintain jurisdiction until that matter is settled:

> But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether

> the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it.

United States v. *United Mineworkers*, 330 U.S. 258, 291-92 (1947) (internal citations omitted).

In some instances, this Court treated the courts' powers narrowly. *See Pennsylvania Bur. of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (rejecting the use of the All Writs Act to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory authorization of appeal); *Rosenbaum* v. *Bauer*, 120 U.S. 450, 453-56 (1887) (court had no power to issue writ of mandamus compelling payment of interest or principal of bonds, absent prior satisfaction of the federal courts' jurisdictional requirements). On the other hand, some of the language that has issued from this Court in other cases would support a broad assertion of power by the lower courts in such cases. For example, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *United States* v. *New York Telegraph Co.*, 434 U.S. 159, 173 (1977) (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273 (1942)).

In fact, writing for the D.C. Circuit, then-Judge Roberts reiterated that a lower court has the power to preserve the availability of proceedings that may be headed its way:

> Once there has been a proceeding of some kind instituted before an agency or court that might lead to an appeal, it makes sense to speak of the matter as being "within [our] appellate jurisdiction" – however prospective or potential that jurisdiction might be.

In re Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004). *See also id.* at 527 ("the All Writs Act 'empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction.'").

If the D.C. Circuit's jurisprudence is confused in this area, the same must be said of other courts. The Fifth Circuit has viewed the courts' power as limited. *See, e.g., Brittingham v. Commissioner*, 451 F.2d 315, 317 (5th Cir. 1971) (finding no independent basis of jurisdiction on which the district court could premise an All Writs order to prevent the IRS from introducing into tax court proceedings documents allegedly obtained in violation of the attorney-client privilege). On the other side of the coin, the Ninth Circuit has relied on the federal courts' inherent authority, and the special role that *habeas* plays in our jurisprudence, to allow appointment of counsel in a

capital case to prepare a federal petition prior to any case being filed. *Brown* v. *Vasquez*, 952 F.2d 1164 (9th Cir. 1991).[10]

Various military courts have sided with this expanded view. *San Antonio Express-News* v. *Morrow*, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996) ("It is true that a charge investigated under Article 32 may never reach this Court, but that is equally true of any charge tried by court-martial. The exercise of our supervisory authority over the Air Force judicial system extends, at least, to 'cases that may potentially reach this Court.'"). *See also Fletcher* v. *Covington*, 42 M.J. 215 (1995); *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) (entertaining petition concerning a special court-martial that had no power to impose a sentence requiring appellate review).

In light of the importance of this issue to the sound administration of justice – including its impact on the flow of interlocutory applications to the Court – certiorari should be granted to clarify the relevant standards.

CONCLUSION

The petition should be granted. At the very least, this Court should hold the petition, while granting him the

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[10] This court later reached the same conclusion as *Brown*, but for different (statutory) reasons, in *McFarland* v. *Scott*, 512 U.S. 849 (1994).

injunctive and habeas relief that he has separately requested, pending the resolution of *Boumediene*.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED BEN BACHA
(BELBACHA),
Petitioner,
v. Civ. A. No. 05-2349 (RMC)
GEORGE W. BUSH,
et al.,
Respondents.

ORDER

Petitioner Ahmed Belbacha, a detainee at the United States Naval Station in Guantanamo Bay, Cuba, filed a petition for a writ of habeas corpus on December 8, 2005. On July 26, 2007, Mr. Belbacha filed an emergency motion for a temporary restraining order asking the Court to enjoin the United States from transferring him from Guantanamo Bay to Algeria, his country of citizenship. Mr. Belbacha contends that it is more likely than not that he will face torture and other forms of abuse from radical Islamist groups in Algeria who oppose his prior service in the Algerian military and his prior employment at a company owned by the Algerian government.

In *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 75 U.S.L.W. 3707 (June 29,

2007), the Court of Appeals held that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), deprives this Court of jurisdiction to hear petitions for habeas corpus brought by Guantanamo detainees, that the deprivation of jurisdiction applies to petitions pending at the time the MCA was passed, and that the deprivation of jurisdiction does not violate the Suspension Clause of the Constitution. The Court also noted that Section 7(a)(2) of the MCA deprives this Court of jurisdiction to "hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *Boumediene*, 476 F.3d at 985-86.

Mr. Belbacha argues that, despite *Boumediene*, this Court has jurisdiction to hear his motion for a temporary restraining order because (1) the Supreme Court has granted certiorari in *Boumediene*, which puts the ongoing validity of that decision in doubt; (2) the D.C. Circuit has withdrawn the mandate in *Boumediene*, which indicates that the Circuit no longer believes that this Court should dismiss habeas petitions pursuant to that decision; and (3) district courts always have jurisdiction to protect their jurisdiction, and thus this Court can enjoin Mr. Belbacha's transfer to Algeria to ensure that it has jurisdiction to adjudicate his habeas petition should the Supreme Court reverse *Boumediene*. The United States disagrees, of course, and argues that the MCA

and *Boumediene* strip this Court of jurisdiction to consider the instant motion.

The Court finds Mr. Belbacha's arguments persuasive as far as they go, and if the question now pending were whether the Court should dismiss Mr. Belbacha's habeas petition, it may well agree with him. But that is not the question; rather, the question is whether this Court has jurisdiction to hear a motion to prevent Mr. Belbacha's transfer from Guantanamo to Algeria. And on that question the MCA is clear: the Court lacks jurisdiction over any and all non-habeas claims raised by aliens who are detained as enemy combatants. Mr. Belbacha argues that if the Court denies his motion on that basis, it will lose jurisdiction over his underlying habeas petition because Mr. Belbacha will be released from U.S. custody. The Court appreciates that point but notes that the D.C. Circuit implicitly rejected that argument when it recently denied a similar motion to enjoin the transfer of a Guantanamo detainee based on lack of jurisdiction. *See Zalita v. Bush*, Case. No. 07-5129 (Order of April 25, 2007). The D.C. Circuit presumably followed that reasoning again when it denied for lack of jurisdiction a Guantanamo detainee's motion for an order requiring the United States to provide 30 day's notice before transferring the detainee from Guantanamo. *See Hamlily v. Gates*, No. 07-1127 (Order of July 16, 2007).

The Supreme Court's recent decision to grant certiorari in *Boumediene* notwithstanding, this Court cannot ignore the plain language of the MCA and the D.C. Circuit's holding that the MCA is constitutional. As the D.C. Circuit made clear, the MCA "eliminates

jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims." *Boumediene*, 476 F.3d at 98 n.1.

Accordingly, it is hereby

ORDERED that Petitioner's Emergency Motion for Order Enjoining Transfer of Petitioner to Likely Abuse and Torture in Algeria [Dkt. No. 26] is **DENIED** for lack of jurisdiction.

SO ORDERED.

DATE: July 27, 2007 /s/

ROSEMARY M. COLLYER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5258 September Term, 2006

05cv02349

Filed On: August 2, 2007 [1058163]

Ahmed Belbacha,

Appellant

Salah Belbacha, as next Friend of Ahmed Belbacha,

Appellee

v.

George W. Bush, et al.,

Appellees

BEFORE: Sentelle, Rogers, and Brown, Circuit Judges

ORDER

Upon consideration of the emergency motion for a stay pending appeal, the opposition thereto, and the reply; and the motion for an expedited appeal schedule, it is

ORDERED that the administrative stay entered by this court on July 30, 2007, be dissolved. It is

FURTHER ORDERED that the motion for a stay pending appeal be denied. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007); *see also Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005) ("[T]his court is bound to follow circuit precedent until it is overruled by an en banc court or the Supreme Court."). It is

FURTHER ORDERED that the appeal be heard on an expedited basis in accordance with 28 U.S.C. § 1657(a). The Clerk is directed to enter a standard briefing schedule.

Per Curiam